80-986

No. 80-

Supreme Court, U.S.
FILED
DEC 16 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner

vs.

SHIRLEY M. HUFSTEDLER, et al.,
Respondents

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner

vs.

UNITED STATES DEPARTMENT OF EDUCATION

and

LINDA POTZ,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred when it contradicted the views of the Courts of Appeals for the First, Fifth, Sixth, Eighth and Ninth Circuits, as well as all of the many lower courts which have ruled upon the issue, all of which hold that the Department of Education's comprehensive employment discrimination regulations now codified at 34 C.F.R. §§ 106.51-106.61 are illegal, as beyond the authority conferred by §§ 901 and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681(a) and 1682.

On December 1, 1980, in United States Department of Education v. Seattle University, Docket No. 80-493, 49 U.S.L.W.

3409, this Court granted certiorari with respect to the Ninth Circuit's decision on this issue.

II

PARTIES

The caption of the case in this Court contains the names of all parties except Thomas Burns, Director of Region I of the Office for Civil Rights, Department of Education, and Maria C. Montalvo, Chief of the Elementary and Secondary Education Branch of Region I, who are respondents in the North Haven case.

The North Haven Board of Education and the Trumbull Board of Education jointly petition for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. B) is reported at 629 F.2d 773. Its denial of the Petition for Rehearing (App. C) is not officially reported. The opinions of the District Court (App. D-1 and D-2, North Haven, and App. E-1 and E-2, Trumbull) are not officially reported. The North Haven District Court decision is unofficially reported in 19 F.E.P. Cases 1505 (D. Conn. April 26, 1979).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 24, 1980 (App. B). On August 7, 1980, petitioners sought rehearing en banc, which was denied by the Court of Appeals by order dated and entered October 24, 1980 (App. B).

Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following statutes and regulations, reproduced in full in the Appendix, are involved in this petition:

1. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). (App. A)

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682. (App. A)

3. The regulations of the Department of Education, 34 C.F.R. §§ 106.51-106.61.* (App. A)

*These regulations, at the time of the District Court's decisions, appeared at 45 C.F.R. §§ 86.51-86.61 inclusive. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980).

Statement of the Case

Petitioners, the North Haven Board of Education ("North Haven") and the Trumbull Board of Education ("Trumbull"), are local Connecticut school boards whose employment practices were the subject of charges of sex discrimination in employment filed with the United States Department of Health, Education and Welfare ("HEW").* HEW, claiming

*The relevant functions of HEW (those under Title IX of the Education Amendments of 1972) were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. Since many of the relevant actions in this case were taken by HEW prior to the reorganization, this petition refers to that agency in addition to the Department of Education ("DOED").

authority by virtue of Subpart E of its regulations, (then 45 C.F.R. §§ 86.51-86.61), purportedly implementing §§ 901 and 902 of Title IX of the Education Amendments of 1972, processed both complaints.* Both school boards pointed out that Subpart E exceeded the authority granted to HEW by Title IX and each cited the line of cases that began with Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979) which first declared the Subpart E regulations invalid, and which triggered a virtual landslide of similar successful challenges to the regulations in district and

*After its establishment, the DOED reissued the regulations of Subpart E at 34 C.F.R. §§ 106.51-106.61 (hereafter "Subpart E").

circuit courts from coast to coast. To date, in addition to the decisions of the District Court herein, the following cases have all ruled Subpart E to be invalid: Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), aff'g 19 F.E.P. Cases 688 (M.D. Ga. 1978); Seattle University v. HEW, 621 F.2d 992 (9th Cir. 1980), cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980), No. 80-493, aff'g 16 F.E.P. Cases 719 (W.D. Wash. 1978); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972, aff'g 438 F. Supp. 1021 (E.D. Mich. 1977); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972, aff'g 455 F. Supp. 1212 (E.D.

Mo. 1978); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972, aff'g Brunswick School Board v. Califano, 449 F. Supp. 866 (D. Me. 1978); Grove City College v. Harris, No. 78-1293 (W.D. Pa. March 10, 1980) [appeal pending, Docket No. 80-2383, Aug. 22, 1980; cross appeal pending, Docket No. 80-2384, Sept. 3, 1980]; Auburn School District v. HEW, No. 78-154, 19 F.E.P. Cases 1504 (D.N.H. March 29, 1979), appeal dismissed, No. 79-1261 (1st Cir. 1980); Board of Education of Bowling Green City District v. HEW, No. C 78-177, 19 F.E.P. Cases 457 (N.D. Ohio March 14, 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979). See also Sobel v. Yeshiva University, 477 F. Supp.

1161 (S.D.N.Y. 1979) (Goettel, J.) (no private right of action under Title IX for employment discrimination); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979) (same); Kneeland v. Bloom Township High School District, 484 F. Supp. 1280 (N.D. Ill. 1980) (same).

Despite requests by North Haven and Trumbull not to proceed, HEW persisted, and demanded cooperation, in North Haven's case under threat of administrative enforcement proceedings leading to the termination of federal financial aid, which in both school systems is substantial. However, no HEW investigation of North Haven occurred, as North Haven promptly filed suit after being advised of HEW's refusal to hold its investigation in abeyance. Trumbull co-

operated with HEW's investigation, at the end of which HEW sent a letter claiming that Trumbull had violated the Subpart E regulations and demanding that Trumbull agree, again under threat of a fund cutoff, to HEW's remedial plan for corrective action.*

Both school boards brought suit in the District of Connecticut, seeking injunctive and declaratory relief against the further use of Subpart E by HEW.**

*Had Trumbull not brought suit at this point, administrative hearings on the merits of the purported findings would have been the next step in HEW's enforcement efforts. See 45 C.F.R. § 80.8.

**North Haven's suit was brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the federal question statute, 28 U.S.C. § 1331, and the mandamus provisions of 28 U.S.C. § 1361.
(continued on next page)

In the North Haven case, HEW filed a Motion to Dismiss, or, in the Alternative, for Summary Judgment, and North Haven cross-moved for summary judgment. Judge Ellen Bree Burns granted North Haven's motion, declaring Subpart E to be invalid, void and of no effect whatsoever, and permanently enjoined HEW from attempting to cut off federal aid to North Haven for alleged non-compliance with the regulations.

In granting summary judgment to North Haven, the District Court followed the reasoning found persuasive by the many other courts which have ruled Sub-

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(continued from page 9)
Trumbull's complaint, in addition to the statutory bases cited by North Haven, relied upon Article I and the Fifth and Fourteenth Amendments to the United States Constitution and upon 42 U.S.C. § 1988.

part E to be invalid. In ruling that HEW's employment regulations were beyond the scope of authority granted in Title IX, these courts have relied on several factors. First, § 901 of Title IX, on its face, does not cover the employment practices of educational institutions, but rather prohibits sex discrimination against the beneficiaries of federal programs, i.e., students. In addition, as the District Court noted, the express exclusions from coverage of Section 901 of Title IX relate solely to student activities or enrollment, and do not mention employment.

Moreover, in reviewing the fund-termination provisions of § 902 of Title IX, the courts have noted how unlikely it was that Congress could

have authorized HEW to terminate funds (which penalizes students) in order to vindicate the rights of teachers. The courts have also relied upon the fact that § 902 of Title IX is a pin-point termination provision. That is, under § 902, termination as a remedy is limited to the particular program where there is non-compliance, and the HEW regulations are concededly and deliberately not so limited.

Additionally, implied coverage of employment in § 901 seems unlikely in view of the express provisions of §§ 906 and 908 of Title IX, which covered employment discrimination in educational institutions by amending 42 U.S.C. § 2000e-2(e)(1) (Title VII) and 29 U.S.C. § 213(a) (the Equal

Pay Act). Thus, the § 901 jurisdiction claimed by HEW and now DOED, over employment is highly improbable considering the structure of the statute, and is also unnecessary and duplicative.*

*In fact, Elaine Dove, who filed the HEW complaint against North Haven, also filed charges with the Equal Employment Opportunity Commission (EEOC Charge No. 011780551). Dove also filed a federal court suit alleging violations of Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1983 as well as Title IX violations. Linda Potz, who filed the HEW complaint against Trumbull, also availed herself of other remedies by filing an EEOC complaint (EEOC Charge No. 011791590), an appeal to the Connecticut Freedom of Information Commission (#F.I.C.-77-156), an appeal to the Connecticut Court of Common Pleas (D.N. 1183125, Fairfield County at Bridgeport) and a Connecticut State Labor Board unfair labor practice charge (T.P.P. 3963) as well as seeking relief through contractual grievance procedures. She has also sued Shirley Blumin, Director of Pupil Services in Trumbull, in Superior Court (D.N. 165640, Fairfield County at Bridgeport) for five hundred thousand dollars ($500,000) damages for allegedly falsely stating that Potz was incompetent.

Further, the Connecticut District Court, as have the numerous other courts, rejected the Government's arguments based on a tortured view of the legislative history. They have also rejected the contention that Subpart E addresses discrimination against students, since Subpart E on its face regulates employment and not the student relationship.

Following Judge Burns' decision in North Haven, (App. D-1, D-2) Trumbull, whose case had also been assigned to Judge Burns, likewise moved for summary judgment. While the government declined to file a brief, noting that the North Haven decision controlled Trumbull's case, respondent Potz, who had filed the HEW complaint against Trumbull, filed a Cross-Motion for

Summary Judgment and sought discovery. The District Court granted Trumbull's Motion for Summary Judgment on May 24, 1979 (App. E-1), relying upon the North Haven decision, and denied Potz's Motion for Summary Judgment.

When Potz moved to open the judgment, the District Court issued a separate opinion rejecting Potz's additional claims based on this Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX permits a private right of action) and again rejected HEW's interpretation of the legislative history of Title IX (App. E-2).

The subsequent appeals by Potz and HEW in both cases were held inactive pending action by this Court on petitions for certiorari in three of the cases

(Romeo Community Schools v. HEW, supra; Islesboro School Committee v. Califano, supra and Junior College District of St. Louis v. Califano, supra) which had declared the regulations in Subpart E invalid. When certiorari was denied in all three cases, the cases herein were consolidated for briefing and argument, and were reactivated.

On June 19, 1980, prior to the Second Circuit's decision, the Ninth Circuit Court of Appeals issued its decision in the Seattle University case, supra. Like the other circuits, the Ninth Circuit ruled the regulations invalid.

On July 24, 1980, the Court of Appeals ruled herein, reversing and remanding for further proceedings both judgments by the District Court, and thus became the only court in the country

to uphold the Subpart E regulations (App. B). The Court of Appeals found the plain language of the statute an insufficient basis for decision, and relied instead upon admittedly ambiguous portions of the legislative history, emphasizing selected excerpts from comments by Senator Bayh during the floor debate.

On July 28, 1980, the Fifth Circuit also ruled the Subpart E regulations invalid, but stated in dictum that § 901 of Title IX did reach employees paid with federal funds. Dougherty County School System v. Harris, supra, 622 F.2d at 738.

Petitioners moved for rehearing on August 7, 1980, which was denied on October 24, 1980 (App. C). As noted above, relying on the conflict created by the decision of the Second Circuit

herein, the government has sought and obtained certiorari in the Seattle case, filed September 26, 1980, cert. granted, 49 U.S.L.W. 3409 (Dec. 1, 1980), No. 80-493.

I. Reasons for Granting the Petition.

A. The Issue Herein is Already Pending Before This Court.

A writ of certiorari to the Ninth Circuit Court of Appeals was granted on December 1, 1980 by this Court in the above-noted case presenting the same issue, United States Department of Education v. Seattle University, No. 80-493, 49 U.S.L.W. 3409. If anything, the instant case is a stronger one for the exercise of this Court's discretion to grant a writ of certiorari, since it is by virtue of the ruling herein by the United States Court of Appeals for the

Second Circuit that there is conflict as to the validity of Subpart E.

Further, we are advised that Seattle University regards its matter as moot and that, accordingly, the extent to which further active participation by Seattle University will be undertaken in the Seattle case is unclear.

The government's brief in the Seattle case is due on January 15, 1981, so that it would appear that, should certiorari be granted in these cases, it would be feasible to consolidate them for joint argument.

B. The Circuit Courts of Appeal are in Conflict.

As the Court of Appeals below recognized, the circuits are in conflict on the question at issue here. The Courts of Appeals for the First, Sixth,

Eighth and Ninth Circuits have all ruled that Title IX of the Education Amendments of 1972 does not confer jurisdiction upon HEW (now DOED) to regulate employment discrimination and that, accordingly, the Subpart E regulations are invalid. The decision below held that, to the contrary, Title IX does confer jurisdiction over employment discrimination, and the regulations are therefore valid. Subsequent to the ruling herein below, yet a third position has been taken by the Court of Appeals for the Fifth Circuit in Dougherty County School System v. Harris, supra, which while agreeing with the First, Sixth, Seventh, Eighth and Ninth Circuits that the Subpart E regulations are invalid, nevertheless indicated in dictum that § 901 of Title IX does affect those employees paid with federal funds.

It is important that North Haven and Trumbull be granted an opportunity to be heard in resolving this conflict between the circuits, because it is their school districts and their federally financed programs that are imperiled by DOED's illegal regulations.

C. The Second Circuit Ruling Wrongly Construes a Major Federal Statute Which Affects Schools and Students Throughout the Nation.

As so many courts have held, and contrary to the ruling by the Second Circuit, Section 901 of Title IX protects the student beneficiaries in federally funded programs and not their teachers. Indeed, it is plain that coverage of employment discrimination is inconsistent with the clear language of the statute.

Section 901 of Title IX of the Education Amendments of 1972 is construc-

ted in two parts. It begins with a basic prohibition, and then in subsections (a)(1)-(9), lists nine specific exclusions from coverage. Those subsections (1) exempt certain types of institutions entirely; (2) address the admission practices of certain non-exempt institutions and (3) exempt certain student programs such as beauty pageants, boy or girl conferences and parent/child activities.

The basic question for decision is whether the following language, the basic prohibition of § 901, addresses employment:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

The Court of Appeals, rejecting the views of several circuits, found this language to be ambiguous, and an insufficient basis for determining the scope of § 901 of Title IX. 629 F.2d at 778. However, it is nevertheless clear that the statute, in plain words, focuses upon what happens within an education program or activity receiving Federal financial assistance. Those who are participants in, receive the benefits of, or are under such a program or activity are plainly students, not employees. Employment, as a concept and as a word, is entirely absent from § 901, as are any of the restrictions and parameters one would expect in a statute directed at employment (cf. Title VII and its BFOQ exception, 42 U.S.C. § 2000e-2(e)(1)).

This construction of the basic prohibition of § 901 is confirmed by the express and detailed tailoring of its coverage contained in subsections (a)1-9, not one of which addresses employment practices. As the Romeo District Court noted:

> [T]his can be explained in only one of two ways: either Congress meant to allow wide open coverage of employment practices under § 1681 while closely regulating § 1681 coverage in all other respects, or, what appears more likely, Congress never meant to include employment practices within the coverage of § 1681 in the first place. Romeo Community Schools v. HEW, 438 F. Supp. 1021, 1032 (E.D. Mich. 1977).

Of course, the lack of coverage of employment in § 901 of Title IX is not surprising: §§ 906 and 908 of the very same bill already addressed the issue by amending 42 U.S.C. § 2000e-2(e)(1) (Title VII of the Civil Rights Act

of 1964) and 29 U.S.C. § 213(a) (the Equal Pay Act) to cover school employees.

In this connection, it is interesting to note that the isolated references to employment in the selected passages from the Senate debate, relied on so heavily by the Court of Appeals, are actually at best ambiguous, for it is never clear whether § 901 alone, or the entire amendment, including, §§ 906 and 908 as well, are referred to. Indeed, many more parts of the legislative history, including Senator Bayh's own outline of the bill, support petitioners' contention that coverage of employment was reserved for §§ 906 and 908.

On this point, while it is inappropriate in this petition to detail the ample legislative history supporting respondents' position, or the convincing rebuttals to the arguments based on

the legislative history relied on by the Court of Appeals, the comments of the First Circuit bear repeating:

> "While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates has led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and the Equal Pay Act." Islesboro School Committee v. Califano, 593 F.2d at 428 (emphasis added).

Conclusion

This Court should now resolve the conflict existing in the Courts of Appeals as to the scope of coverage of § 901 of Title IX of the Education Amend-

ments of 1972, and as to the legality of the Subpart E regulations, which are at present invalid in five circuits, valid in one circuit, and of uncertain status in the rest. The petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and consolidate the cases for argument with United States Department of Education v. Seattle University, Docket No. 80-493.

RESPECTFULLY SUBMITTED,
THE PETITIONER
THE NORTH HAVEN BOARD OF EDUCATION

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RESPECTFULLY SUBMITTED,
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Dated: December 1980

CERTIFICATION

The undersigned, a member of the Bar of this Court, hereby certifies that on the day of December, 1980 he placed in a United States Post Office mail box, first class postage prepaid, three copies of the foregoing Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari to:

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